Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1993

ROSS ALAN LANDRO,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

Petition for a Writ of Certiorari to
the Supreme Court of
the State of Minnesota

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. What are the appropriate factors to be considered in determining whether the prosecution has overcome its burden when presumptive prejudice has been found based on intentional juror misconduct?

II. Did the prosecution overcome its burden of showing that a juror's intentional misconduct did not prejudice the defendant?

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OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported as State v. Landro, 504 N.W.2d 741 (Minn. 1993), and appears in the Appendix to this Petition. The Order and Memorandum of the Ramsey County District Court is unpublished and appears in the Appendix to this Petition.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on August 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VI to the U. S. Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

Art. 1, §6 to the Minnesota Constitution:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previouslyascertained by law. In all prosecutions of crimes defined

> by law as felonies, the accused has the right to a jury of twelve members. In all other criminal prosecutions, the legislature may provide for the number of jurors, provided that a jury haveat least six members. The accused shall enjoy the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel in his defense.

STATEMENT OF THE CASE

Petitioner, Ross Alan Landro, was convicted of first degree murder in violation of Minn. Stat. Ann. §609.185(1), following a jury trial in Ramsey County District Court. He was found guilty as charged on June 11, 1992 and was sentenced to a mandatory term of life imprisonment. He is currently incarcerated at the Minnesota Correctional Facility - Oak Park Heights.

Shortly after the verdict was returned, Diana Pierce-Babcock, an anchorperson for a local television station, telephoned the trial court and informed the court she had been contacted by a juror during the trial. The court notified both attorneys. Defense counsel moved for a Schwartz hearing, named after Schwartz v. Minneapolis Suburban Bus Co., 258 Minn. 325, 104 N.W.2d 301 (1960). The motion by defense counsel was granted and a Schwartz hearing was held at which ten of the twelve jurors were questioned. Anchorwoman Diana Pierce-Babcock testified that Juror Dan Williams, the foreman of the jury, had contacted her three times during the course of the trial. Pierce-Babcock testified that Juror Williams alluded to an interesting trial containing racial overtones which would be worthy of media

coverage. Landro, a white man, was convicted along with two co-defendants of murdering Jesse Adams, a black man. Further, Williams told Pierce-Babcock he would make himself available for television interviews. Juror Williams admitted calling Pierce-Babcock during the trial, but he could recall only one conversation. He neither denied nor acknowledged the conversations to which Pierce-Babcock testified.

Petitioner brought a motion for a new trial based, in part, on misconduct by the juror foreman. In an Order denying the motion, the trial court ruled the contact between the juror and the television anchorperson had been improper and in violation of the trial court's instructions but prejudice had not resulted.

Petitioner appealed this ruling to the Minnesota Supreme Court arguing the juror misconduct was a violation of his

right to a fair and impartial trial as guaranteed by the Sixth Amendment to the U.S. Constitution and Article 1, Section 6 of the Minnesota Constitution. On August 20, 1993, the Minnesota Supreme Court affirmed the decision of the Ramsey County District Court.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

This case presents an important question of constitutional law which should be decided by this Court.

Certiorari should be granted so this Court can specifically and unequivocally rule what factors should be considered for States to overcome the presumption of prejudice when juror misconduct has been found.

Petitioner argues he was deprived of a fair trial as guaranteed by the Sixth Amendment of the U.S. Constitution and

Article 1, Section 6 of the Minnesota Constitution due to juror misconduct.

The Sixth Amendment to the U.S. Constitution provides "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. 6 (emphasis added). This guarantee is binding on the states through the Fourteenth Amendment. Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546 (1965). The Minnesota Constitution also guarantees a public trial by an impartial jury . . . ." Minn. Const. art. 1, §6.

The right to an impartial, indifferent jury is the most fundamental right. Without this most basic rule all other rights are meaningless.

In this case, the facts are not in dispute. The trial court ruled misconduct

had occurred by a juror. The jury foreman called a local television anchorperson on two or three separate occasions during the course of the trial. During the calls the juror discussed the trial and encouraged the anchorperson to provide media coverage and stated he would be available for interviews. This was in clear violation of the Judge's order that jurors not discuss the case either among themselves prior to deliberations or with anyone else prior to a verdict. Because of possible racial overtones, the trial court took extensive measures to minimize publicity. At one point, the court ordered the victim's mother from the courtroom after her angry remarks were overheard by a juror. Jurors were required to use separate elevators, wear juror badges, remain with the bailiff, and not read the local newspapers.

Notwithstanding the court's instructions, Juror Williams discussed with

the media the substance of the case. The same juror then placed himself in a position to become the jury foreperson and lead the jurors in determining the innocence or guilt of defendant.

The trial court found juror misconduct had occurred and that it was presumptively prejudicial. This Court has previously ruled that this presumption of prejudice is not conclusive but "the burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless to the defendant." Remmer v. U.S., 347 U.S. 227, 74 S.Ct. 450 (1954).

In determining whether the prosecution met its burden, the court applied four factors that had previously been relied upon by the Minnesota Supreme Court in the case of State v. Cox, 322 N.W.2d 555 (1982). In Cox, the Minnesota Supreme Court held that once there is a

presumption of prejudice, the burden shifts to the prosecution to prove beyond a resaonble doubt that the error did not contribute to the verdict. The test has also been phrased as no reasonable possibility that the extrinsic material could have affected the verdict. Id, at 559.

In Cox, the court articulated four factors to be considered in determining whether the prosecution has met its burden of proving that the misconduct did not prejudice the defendant:

1. the nature and source of the prejudicial matter;

2. the number of jurors exposed to the misconduct;

3. the weight of the evidence; and

4. the likelihood that curative measures were effective in reducing the prejudice.

These factors do not resolve the ultimate issue of whether petitioner received a fair and impartial trial. The

petitioner argues that the factors as formulated in Cox are wrongfully applied in matters of intentional juror misconduct and fail to determine the ultimate issue of fairness and impartiality.

These factors, as set forth in Cox, simply determine whether the weight of the evidence is sufficient to conclude that a defendant is guilty as determined by a jury. The test in Cox is not in accord with Remmer, which places a burden on the prosecution to establish that the contact was harmless to the defendant. Under Cox, the only burden the prosecution simply needs to show is that the defendant would have been found guilty regardless. That, in effect, places the burden on the defendant to prove that, in fact, the juror contact was harmful, prejudicial, and effectively denied him a fair and impartial trial.

In this case, the juror willfully disregarded the court's instructions and repeatedly contacted the media.

While the court readily dismissses this occurrence as a minor impropriety, Juror Williams' intentional conduct goes to the heart of petitioner's entitlement to a fair trial. Juror Williams' conduct and behavior are more indicative of his willingness to disregard the Constitution, the court's instructions, and the appellant's right to a fair trial than are his self-serving statements after being confronted regarding his behavior. A court must rely on the truthfulness and honesty proscribed by jurors to exact the fundamentals of a fair trial. Jury foreman Williams' conduct exhibited an untrustworthy and dishonest character which would lend his post-trial comments to the court of little credibility.

Jury foreman Williams continued this devious conduct by suggesting memory lapses to conversations he himself initiated with anchorwoman Pierce-Babcock. When a court cannot rely on a juror to abide by the oath he has sworn to uphhold, the presumption of innocence and constitutional right to a fair trial are but meaningless jestures. The jury foreman's intentional misconduct brings into question the defendant's entitlement to a fair trial.

The greater issue is one of inherent trust in our democracy and system of laws. To dismiss overt and intentional juror misconduct as minimal and harmless error calls into question the basic issues of trust in our system of laws. The public and society at large need to be reassured and demand that the system work fairly and impartially for everyone, rich or poor,

black or white. When inherent trust becomes eroded, that cancer strikes at the very heart of our judicial system.

A jury foreman who intentionally disregards the oath he is sworn to uphold, the court's instructions, and the Constitution cannot effectively be cured by mere questioning. It seems somewhat ironic that a defendant can be brought before a tribunal for allegedly violating the laws of this Country, and subsequently be judged and found guilty by members of society who intentionally disregard the laws of the judicial system. Petitioner's right, and the court's obligation, to a fair and impartial trial has effectively been compromised when intentional juror misconduct occurs and can only be cured through a new trial with an impartial jury.

Petitioner asks the Court to consider and weigh the ramifications of minimizing or dismissing intentional juror

misconduct with the broader impact such misconduct has on the trust the public places on the judicial system, and the strong potential for inherent unfairness and disregard to a defendant's Sixth Amendment right to a fair and impartial trial. Petitioner's Sixth Amendment right to a fair and impartial trial has been effectively negated, and similarly, allegedly cured, by nothing more than minutes worth of testimony of a juror whose very own conduct is at issue. To conclude that a simple hearing is sufficient to cure an intentional violation by Juror Williams is to conclude that violations of juror misconduct are without effect and can be cured by simply weighing the sufficiency of the evidence to convict.

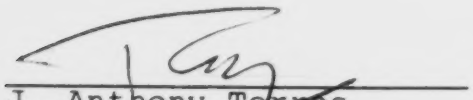
Petitioner asks this Court to review this issue of intentional juror misconduct in the context of appellant's right to a fair and impartial trial under the Sixth

Amendment and the State's burden of proving as harmless what the courts have previously ruled as presumptively prejudicial conduct.

CONCLUSION

For the reason urged herein, it is respectfully requested that a Writ of Certiorari issue to review the judgment of the Minnesota Supreme Court entered herein.

Respectfully submitted,



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A P P E N D I X

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

State of Minnesota, File No. 9103331

Plaintiff,

vs. ORDER

Ross Alan Landro,

Defendant.

The above-entitled matter came on for a Schwartz hearing before the Honorable John S. Connolly, Judge of the District Court, on the 15 day of July, 1992 at 1:00 p.m. Robert Plesha and Clayton Robinson appeared on behalf of the plaintiff State of Minnesota. Michael Davis appeared on behalf of defendant Ross Alan Landro. Defendant made a motion, pursuant to Minnesota Rules of Criminal Procedure for a new trial.

The Schwartz hearing centered around possible juror misconduct. Ten of the twelve jurors were examined including juror

Williams who the defense claims is guilty of misconduct. None of the ten jurors who testified said juror Williams made reference regarding outside contact with any third party. After the testimony of the ten jurors, defendant's counsel indicated to the court the defendant does not wish to call the two remaining jurors for testimony.

The Court, having heard the arguments of counsel, and based upon all the files, records and proceedings herein to date,

IT IS HEREBY ORDERED:

1. That the defendant's motions are denied in all respects.

The attached memorandum is hereby incorporated by reference.

Dated August 17, 1992 BY THE COURT:

/s/ John S. Connolly
John S. Connolly
Judge of
District Court

MEMORANDUM

The heart of the motion centers around contact twice during the trial of Ross Landro between juror Williams and Diana Pierce, a T.V. anchor for KARE 11 news. Williams knew Pierce professionally. When Williams initially contacted Pierce during the trial, it was regarding a student at Brooklyn Center High School who he felt was a victim of racial bias. During the conversation, Mr. Williams referred to Landro's case. He asked her if she would be interested in interviewing him once the jury reached a verdict. He encouraged her to obtain a transcript of the proceedings and that she "would find it interesting." In his conversation with Pierce, Williams questioned the professionalism of Jill Seacrist an investigator and witness for the defense, but did not comment on either her testimony or credibility.

In order for this court to grant the defendant a new trial, the defendant has the burden of proving actual misconduct and prejudice. Once the defendant shows there was actual contact between a juror and a third party and shows that the contact involves the case upon which the juror was seated, a presumption of prejudice is established. Remmer v. United States, 347 U.S. 227 (1954); Odell v. Armontrout, 878 F.2d 1076, 1080 (8th Cir. 1988).

In this case, juror Williams stated that he had contact with a third party, Diana Pierce of KARE 11 news. During the conversations, he indirectly referred to the case for which he was serving as a juror. Specifically, he asked her if she would be interested in interviewing him once the verdict was returned and stated that he encouraged her to obtain a transcript of the proceedings and that he thought she "would find it interesting".

Mr. Williams referred to the voir dire process and also questioned the professionalism of a defense witness, investigator Jill Seacrist. He did not discuss her testimony nor did he comment on her credibility.

Once the presumption of prejudice burden is met, the state has the burden of proving that the misconduct did not influence the verdict reached by the jury. The Minnesota Court of Appeals stated in Crandall that the trial court should consider the "nature of the contact, the number of jurors exposed to the contact, the weight of the evidence on the merits of the case, and the likelihood that the prejudice was abated by curative measures." State v. Crandall, 452 N.W.2d 768, 711 (Minn. Ct. App. 1990).

In this case, the nature of the contact was such that the juror did not

reveal his opinion as to what the verdict would be, nor did he show any prejudice toward the defendant. In addition, any indication of his opinion about any aspect of the case was revealed only after the presentation of all the evidence, the proper time the juror could well have formed an opinion that he should not have communicated.

The only revelation of juror William's opinion was a negative comment about the professionalism of one witness. Considering that the juror's wife was in the same profession as the witness, Mr. William's comments about the witness may be considered a "natural human response to an uncomfortable situation". State v. Butzin, 404 N.W.2d 819, 828 (Minn. Ct. App. 1987).

The evidence against Ross Landro in this case was overwhelming. The jury only deliberated three hours. The conversations between Mr. Williams and Ms. Pierce had

nothing to do with the guilt or innocence of Ross Landro and therefore, although improper, was not enough to prejudice the defendant and justify a new trial. State v. Benson, 384 N.W.2d 190, 196 (Minn. Ct. App. 1986).

JSC

STATE of Minnesota, Respondent,

v.

Ross Alan LANDRO, Appellant.

No. C5-92-1618.

Supreme Court of Minnesota.

Aug. 20, 1993.

Defendant was convicted in the Ramsey County Court, John S. Connolly, Jr., of first and second-degree murder, and he appealed. The Supreme Court, Tomljanovich, J., held that: (1) evidence supported finding that juror misconduct occurring when juror contacted local television reporter did not prejudice verdict, and (2) accomplice's brother was not himself accomplice and adequately corroborated accomplice's testimony.

Affirmed.

Syllabus by the Court

1. It is misconduct for a juror to contact the media during a trial.

2. The trial court did not abuse its discretion in determining that the misconduct did not prejudice the verdict when person contacted from the media did not attempt to influence the verdict and when the other jurors did not know that the juror had contacted the media.

3. An accomplice is one capable of being indicted and convicted for the same crime.

4. Accomplice testimony may be corroborated by family members.

5. Evidentiary issues must be preserved by a timely objection unless they involve a plain error affecting substantial rights or an error of fundamental law.

John M. Stuart, Marie L. Wolf, State Public Defenders, Minneapolis, for appellant.

Hubert H. Humphrey III, Atty. Gen., Tom Foley, Darrell C. Hill, Ramsey County Atty., St. Paul, for respondent.

Heard, considered and decided by the court en banc.

TOMLJANOVICH, Justice.

Ross Alan Landro appeals his convictions for first and second degree murder. He argues that this conviction cannot stand because of juror misconduct, the improper admission of rebuttal evidence, and insufficient corroboration of accomplice testimony. We affirm.

Jessie Adams was shot to death during the early morning hours of December 7, 1991 outside of Born's Bar, St. Paul.[1] Appellant[2] and a friend, James Taylor, spent most of the day of December 6, 1991

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1. Adams was African American. Generally the race of the key players in a crime is not relevant. In this case, however, there was some evidence indicating that the races of various parties and ensuing racial conflict precipitated the crime.

2. Appellant is Native American; it appears from the record, however, that he is sometimes mistaken as Caucasian.

together. At about noon they met at a friend's house. According to James' testimony, appellant showed him a .22 caliber revolver that he kept in the waistband of his pants. Appellant's testimony differed: he testified that the gun belonged to James. Accompanied by James, appellant purchased some shells for the gun at 2:10 p.m. from a sporting goods store. The purchase of the bullets was corroborated by an employee of the store and a sales record; appellant testified, however, that James had wanted to buy the bullets and that he did not purchase them but was merely lending James the money. James testified that appellant then loaded the gun and put some shells in his pocket.

Around 5:00 p.m., they were joined by James' younger brother, Jeffrey. The three then went to several shopping malls where they either stole things, returned stolen goods for money, or both.

Afterward, they bought some beer at a liquor store and stopped at a couple of bars.

At about 10:30 p.m. the three arrived at a friend's house. According to the testimony of the Taylor brothers, Appellant tried sell the gun for $25. Appellant denied that he had attempted to do so. Testimony at trial indicated, however, that after appellant attempted to sell the gun, the prospective buyer handed the gun to James who tried to take it. At this time, appellant announced that it was his gun, took it and tucked it into his pants. The three left at approximately 11:00 p.m. They went to a bar where James almost got into a fight. Next they went to the home of another friend. An argument developed between James and this friend. According to the friend's mother, appellant helped escort James out and apologized for the behavior. They left about midnight.

They arrived at Born's Bar at about 12:30 a.m. Jesse Adams was at Born's with Cheryl Clark; the mother of his fiancee. Appellant and the Taylors joined a group of friends. The bartender testified that their group was loud and described a wrestling match involving the Taylors shortly before closing that resulted in a broken glass. After the bartender took the Taylors' drinks away, James accused Adams and one of Adams' friends of having stolen them.

At closing time, appellant's group left first, Adams and Clark were close behind. At this point, the testimony of the state's witnesses diverged. According to James, their group was out on the sidewalk and a black female--presumably Cheryl Clark--continued to make comments directed at them as she had earlier in the bar. James claimed that he told her to "get the f___ out of here," and that Adams

then took off his coat and started to come after James.

Clark testified differently. She said that a group of whites--presumably the Taylor group--confronted them 10-15 feet from the front door and asked them, "What the hell you doing in this neighborhood?" She testified that then one man--presumably James Taylor--emerged from the group. Adams told the man to leave him alone. In response the man began swinging at Adams. Clark's testimony continued that Adams, with his hands at his sides, said he did not want any trouble, but that the man responded, "I'll f___ you up, nigger." Clark continued that a second man, taller and thinner than the first, then joined the first man.

A fight broke out and Clark went to her car to get a mallet. When she returned, she said that the taller man said "I got something for you, to, bitch." She

said that he opened his jacket and that she saw the butt end of a gun. At trial, Clark identified appellant as this man. Previously, however, she had identified James Taylor as the man with the gun. She returned to the bar to get help and was pounding on the windows when she heard the firing of two shots. The Taylors returned to the bar a few minutes later. Clark originally identified them as the two involved in the shooting. At trial, however, she said she was no longer certain.

The Taylor brothers told a different story. They described how Adams and James fell to the ground and started wrestling, with Adams on top. They testified that neither Adams nor James had weapons. Jeff testified that he was standing near his brother's head and watched Landro take out his gun and shoot Adams three or four times. After the shots were fired, James

pushed Adams off. The Taylors testified that appellant then shot Adams one more time. They testified that appellant ran towards his car and they went back to the bar.

Appellant's testimony differed. He testified that when he arrived at Born's bar with the Taylors, he ordered a pitcher of beer. Tired of the commotion that seemed to follow James, he opted instead to spend some time visiting with other people he knew. He testified that he heard the Taylors fighting and heard a glass break. He decided to leave, placed his pitcher on a table and announced that he was leaving. He testified that the Taylors told him that they would be out in a minute.

Appellant testified that he next went to his car and smoked a cigarette while he waited for the Taylors. He testified that he thought he remembered

hearing some thing that sounded like fighting and gun shots, assumed that the Taylors were involved--because James Taylor, according to appellant's testimony, was always causing trouble--and decided to leave.

Upon leaving, appellant testified that he drove to the house of a friend, Wanda Peterson. She testified that when appellant arrived, he was nervous and had a gun. Using her telephone, he telephoned some friends to find out what had happened. He talked with a friend who told him that the Taylors were saying that he, appellant, had shot someone. Appellant testified that at first he thought it was a joke, but then he heard the voices of the Taylors in the background. Appellant testified that Jeff was saying that he would not go to jail for something he had not done; James was saying "Ross did it, Ross did it." Appellant

denied having done so and got off the phone.

During the next time period, there seems to be a hole in appellant's story. In his original statement, he testified that he had only been at Petersons' house a minute. At trial he elongated this to an hour or more. In any event, he testified that he next drove to the home of yet more friends. When he arrived there, a cab was arriving; the Taylor brothers came out of the house and Jeff got into the cab. The driver's records establish that this was at about 3:19 a.m.--James got into appellant's car; appellant asked him what had happened. Appellant testified that James told him, "Oh man, I got some problems, " but "This guy ain't got no problems no more." James did not want to discuss the shooting further.

Appellant and James drove to a friend's house, where they spent the rest

of the night. Appellant testified that James was acting "weird, nervous [and] scared," and at one point said something about appellant having shot someone. In the morning, appellant agreed to give James a ride to Minneapolis. When he left the next morning, Appellant testified that he asked the friend to give him some clothing for warmth and she did so. Appellant was taken into custody while leaving the house.

The grand jury indicted appellant on January 22, 1992. The trial began on June 1, 1992. Both of the Taylors testified. On June 10, 1992, after the evidence had concluded but before closing arguments and jury instructions, one juror, Dan Williams, telephoned a local anchorperson, Diana Pierce. Williams had talked to her earlier during the trial and told her that she would find the case "very intersting." During the telephone call and previous conversation, he did not discuss the case

at length, but rather suggested that she obtain a transcript. The comments he made about the substance of the trial were limited to his expressing skepticism as to the testimony of the defense investigator. He also testified that he thought that the case raised similar issues to the Rodney King incident and trial. The acquittal and subsequent riots had been publicized shortly before this trial began. He told Pierce the names of the defendant, the judge and the attorneys. The conversation lasted about 10 minutes. At the subsequent hearing, Pierce testified that Williams said, "I wanted to talk to you about the case * * * going on in St. Paul that I had briefly mentioned two weeks prior." He also told her that he was willing to make himself available for an interview after the verdict was returned which could be as early as the following day. Pierce testified that she did nothing in response

to the call except telephone the court two days later to inform it of the conversation.

On June 11, 1992 the attorneys gave their closing arguments, the jury was instructed, then sequestered at 11:54 a.m. Juror Williams was elected foreperson. The jury returned a verdict of guilty of first and second degree murder at 4:57 p.m. Appellant was sentenced that afternoon.

Appellant moved for a new trial based upon juror misconduct. The court held a hearing at which Williams, Pierce and ten of the other jurors testified. Ten of the jurors were called and none testified that they knew Williams had contacted Pierce. The court denied the motion, ruling that although it was juror misconduct for Williams to have contacted Pierce, it has not prejudiced the verdict.

I.

The first issue we address is whether juror misconduct prejudiced the verdict. Juror Daniel Williams contacted an anchor for a local news station and mentioned that there was an interesting case going on in Ramsey County, and that the case had possible racial overtones. The anchorperson testified that she did nothing in response to Williams' comments. Williams telephoned her again on the evening of June 10, 1991--after the evidence was complete but before closing arguments--and suggested that she look into the trial. Williams does not deny that he made this call and testified that he may have told the anchorperson about the possible racial overtones and the methods of the investigator for the defense.

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for

> obvious reasons, deemed presumptively prejudicial. * * * The presumption is not conclusive, but the burden rests heavily upon the Government to establish * * * that such contact with the juror was harmless to the defendant.

Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954). It is misconduct for a juror to contact the media during the trial about the trial. The decision to grant a new trial based upon juror misconduct rests within the discretion of the trial court and will not be reversed unless there is an abuse of discretion. Stayberg v. Henderson, 277 Minn. ~~16~~, 21, 151 N.W.2d 290, 293 (1967).

> When juror misconduct is alleged [the trial court should not decide and take final action ex parte on [such] information * * *, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.

Remmer, 347 U.S. at 229-301, 74 S.Ct. at 451. We mandated this practice in Schwartz v. Minneapolis Suburban Bus Co., 258 Minn.

325, 104 N.W.2d 301 (1960). The trial court acted properly when he heard about the misconduct: he held the Schwartz hearing to determine the nature of the misconduct and whether it had caused prejudice.

In reviewing the trial court's decision, this court considers the following factors: (1) the nature and source of the prejudicial matter; (2) the number of jurors exposed to the misconduct; (3) the weight of evidence; and (4) the likelihood that curative measures were effective in reducing the prejudice. State v. Cox, 322 N.W.2d 555, 559 (Minn. 1982).

In this case, there is no allegation that Pierce exerted influence or even attempted to exert influence on either Williams or the jury as whole. Ten of the eleven remaining jurors testified at the Schwartz hearing that they knew nothing about the contacts between Williams and

Pierce. Thus the first and second factors indicate that the juror misconduct was not prejudicial.

The third factor is the weight of the evidence properly before the jury. In ruling on the new trial motion, the trial court ruled that the evidence against the appellant was "overwhelming."

Our review of the record leads us to conclude that it was not an abuse of discretion for the trial judge to have determined that the state's case was overwhelming. There was much testimony linking the defendant to the crime, most notably Wanda Peterson's testimony that when appellant arrived at her home shortly after the time of the murder, he had a gun. Furthermore, during his examination, appellant's story as to where he had been and what he had been doing immediately after Adams was shot kept changing and was internally inconsistent. It was reasonable

for the trial judge to conclude the evidence against Landro was overwhelming.

As to the fourth factor, the trial judge did not take curative measures because he did not know about Williams' misconduct until after the return of the verdict. Thus, none of the four factors tend to show that the juror misconduct prejudiced the verdict. The trial court did not abuse its discretion in denying the motion for a new trial based on the juror misconduct.

II.

Defendant also argues that his conviction should be reversed because accomplice testimony was improperly admitted at trial. Convictions may only rest upon the testimony of an accomplice if that testimony is corroborated. The relevant statute reads as follows:

> A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such

> other evidence as tends to convict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

Minn. Stat. 634.04 (1992). The test for determining whether someone is an accomplice is whether that person could have been indicted and convicted for the crime for which the accused is charged. State v. Jensen, 289 Minn. 444, 446, 184 N.W.2d 813, 815 (1970). The parties do not dispute that James Taylor is an accomplice: he was indicted and pleaded guilty to second degree murder for his role in these events. A large portion of the corroboration of James Taylor's testimony was contained in the testimony of his brother Jeff. The issue before us is whether or not Jeff Taylor was an accomplice.

Jeff Taylor was not an accomplice in this case. The grand jury did not indict

him. Thus the threshold requirement for accomplice status has not been met. Because Jeff was not an accomplice, his testimony was properly used to corroborate the testimony of his brother, James, who was an accomplice. His testimony adequately corroborates the testimony of James. Corroborating evidence is sufficient "if it restores confidence in the accomplice's testimony, confirming its truth and pointing to the defendant's guilt in some substantial degree." State v. Lemire, 315 N.W.2d 606, 610 (Minn. 1982). This test is easily met. Jeff testified that appellant shot Adams. This corroborates his brother's testimony and points to appellant's guilt.

Appellant also argues that we should rule that Jeff Taylor's testimony should not be allowed to corroborate James Taylor's testimony because of their familial relationship. We do not believe

that we need to carve out such an exception to the accomplice testimony statute. Of course, family members might be biased in favor of other family members. We believe, however, that cross-examination is an ample tool by which to expose the presence of possible bias to the jury.

III.

Defendant claims that his trial was prejudiced by the improper admission of evidence by the state on rebuttal. The state counters that this issue is not properly before us because it was not objected to at trial and does not involve a plain error affecting substantial rights or an error of fundamental law. We agree with the state. The issue is waived on appeal. Minn. R. Evid. 103(a)(1), 103(d); Minn. R. Crim. P. 31.02.

In sum, we believe that appellant received a fair trial. The trial judge properly concluded that the juror

misconduct did not prejudice the verdict. James Taylor's testimony was properly corroborated by the testimony of Jeff Taylor. The evidentiary issue was not properly objected to at trial and is waived.

Affirmed.